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Supreme Court of the United States

October Term, ~~1952~~ 1954

THE WANDERER

WILBURN BOAT COMPANY, ET AL.,
Petitioner-Appellants Below,

VERSUS

FIREMAN'S FUND INSURANCE COMPANY,
Respondents-Appellees Below

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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Petitioners pray for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on January 29, 1953, affirming the judgment of the District Court of the United States for the Eastern District of Texas in favor of Respondent insurance company and ordering final judgment for Respondent.

Opinions Below

The District Court did not file Findings of Fact and Conclusions of Law pursuant to Rule 52 of the FEDERAL RULES OF CIVIL PROCEDURE but instead wrote an opinion in letter form which, after the death of the late Judge Randolph Bryant, was accepted by the parties hereto in lieu of Findings of Fact and Conclusions of Law and was made a part of the Judgment (R. 32-34). The Trial Court's decision is unreported. The opinion of the Fifth Circuit Judges of the Court of Appeals (R. 278-286) is reported in 201 F. 2d 833, 1953 AMC 284. This decision of the Fifth Circuit Court in effect reverses its ruling in MARYLAND CASUALTY COMPANY v. CUSHING, 198 F. 2d 536, 1952 AMC 1803. The latter decision is now pending in this court, No. 498, October Term, 1952.[1]

Jurisdiction

The Judgment of the Court of Appeals was entered January 29, 1953 (R. 278). No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 USC 1254 (1).

Questions Presented

1. Where a marine insurance policy is sold within the boundaries of a State, to citizens of the State, by a foreign corporation authorized to do business in the State, can the State legislature enact insurance laws which regulate the terms of a marine insurance policy and the defenses available to such foreign insurance company?

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[1] The cases differ in that a specific substantive right of admiralty law is challenged in **Maryland Casualty Company v. Cushing**, No. 498, to-wit: The Limitation of Liability Statute. In the instant case no substantive right of admiralty law is involved.

In HOOPER v. CALIFORNIA, 155 U.S. 648 this court answered the above question in the affirmative. The Fifth Circuit disregarded this ruling and answered the question in the negative.

2. Is the general admiralty law so broad in its scope as to regulate the marine insurance business to the exclusion of State insurance laws regulating the issuance of insurance policies and the available defenses thereunder?

In NUTTING v. MASSACHUSETTS, 183 U.S. 553 this court answered the above question in the negative. The Fifth Circuit disregarded this ruling and answered the question in the affirmative.

3. Is the marine insurance business to be excluded from the plain and inclusive language of the McCarran Act of 1945 (15 USC Sec. 1012), which reads in part as follows:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

This court has not ruled on this question. The Fifth Circuit held that the McCarran Act is not applicable to cases involving marine insurance policies.

4. Are State insurance laws, which declare an encumbrance clause in an insurance policy to be void and which provide that an insurance company cannot void a policy on the grounds of breach of warranty unless the breach contributes to the loss, nullified by general admiralty law and by the United States Constitution because of an alleged violation of some characteristic feature of substantive admiralty law and Article III, Section 2 of the UNITED STATES CONSTITUTION?

The Fifth Circuit answered this question in the affirma-

tive. This court has not ruled on this specific legal question.

5. Are all or part of the State insurance laws regulating the insurance business rendered impotent by the "uniformity of law doctrine" adopted by this court in the JENSEN case and related decisions,[2] and can this doctrine be extended to include maritime contract cases?

This court has answered the above question in the negative. The Fifth Circuit answered the above question in the affirmative and in particular relies on this court's ruling in KNICKERBOCHER ICE CO. v. STEWART, 253 U.S. 149 (1920), which is a Workmen's compensation case.

6. Can the sovereign right of a State to regulate foreign corporations doing business within its boundaries be impaired by general admiralty law when Congress has declared that the continued regulation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation of such business by the several States.[3]

This court has not ruled on the above legal question. The Fifth Circuit answered the above question in the negative in CUSHING v. MARYLAND CASUALTY CO., 198 F. 2d 536, 198 F. 2d 1021 and in the affirmative in WILBURN BOAT CO. v. FIREMAN'S FUND INSURANCE CO., 201 F. 2d 833, the instant case.

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[2] See **Southern Pacific v. Jensen**, 244 U.S. 205 (1917), and **Knickerbocher Ice Co. v. Stewart**, 253 U.S. 149 (1920). Both cases relate to tort claims and the validity of State Workman Compensation Acts for injuries received on navigable waters and do not extend the doctrine of uniformity to maritime contract cases. **Standard Dredging Co. v. Murphy**, 319 U.S. 306, limits the application of the uniformity doctrine to Workman Compensation cases.

[3] The McCarran Act, 15 U.S.C.A., Sec. 1011. Congress did not exclude the marine insurance business from the provisions of the McCarran Act but the Fifth Circuit Court of Appeals in effect did.

Constitutional and Statutory Law Involved

Art. III Section 2—UNITED STATES CONSTITUTION.

"The judicial Power shall extend * * * to all cases of admiralty and maritime jurisdiction * * * ."

Title 28—UNITED STATES CODE, Section 1333.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Title 15—Title 15 UNITED STATES CODE, Sections 1011 and 1012.

THE MCCARRAN ACT OF 1945.

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

59 Stat. 33, 15 USC 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: * * *."

59 Stat. 34, as amended by 61 Stat. 448, 15 USC 1012.

VERNON'S TEXAS STATUTE, Chapter 10, entitled *"State Insurance Commission"*. Article 4890—*Lien on insured property.*[4]

> "Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

VERNON'S TEXAS STATUTE Chapter 11, entitled *"Fire and Marine Companies"*. Article 4930—*Breach by Insured.*[5]

> "No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application thereof, upon personal property, shall void the policy or contract or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

Statement of the Case

Petitioners, citizens of Texas, purchased a marine insurance policy from Respondent, a foreign insurance company, in order to cover their Motorboat WANDERER

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[4] In 1951 the Texas insurance statutes were revised and Article 4890 became Section 5.37 of the **Insurance Code of 1951.** There is a slight change in the wording of the two statutes.

[5] Section 6.14 of the **Texas Insurance Code of 1951,** is identical to Article 4930.

against all marine risks including fire. Subsequent to the effective date of the policy the WANDERER was completely destroyed by fire.

The policy was purchased in Denison, Texas, from a Texas insurance agent who delivered the policy to Petitioners in Denison, Texas. The policy was payable in Denison, Texas. According to Texas insurance laws the insurance agent was Respondent's agent.[6] Respondent is a foreign insurance corporation authorized to transact insurance business in Texas and has an agent in Texas for service of process. The contract of insurance was made and entered into under and by virtue of the laws of Texas.[7]

The WANDERER was destroyed by fire while she lay moored in Lake Texoma, an inland lake between Texas and Oklahoma. There is no question in this case that the fire clause in the policy covered the loss in question.

The Respondent insurance company refused to pay the Petitioners for the total loss of the WANDERER on the grounds that certain conditions or warranties, not connected with the loss, had been breached. One of the warranties relied upon by the insurance company is an encumbrance clause.[8] Article 4890 of the Texas insurance statutes[9] declares this warranty to be null and void. The encumbrance clause of the policy in effect provides that the insurance coverage shall be void in case the insured vessel is mortgaged without the insurance company's previous consent in writ-

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[6] **Vernon's Revised Texas Statute of 1925**, Article 5056.

[7] **Vernon's Revised Texas Statute of 1925**, Article 5054.

[8] The clause is worded as follows (R. 241):

> "It is also agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the assurers."

[9] **Vernon's Revised Texas Statute of 1925**, Article 4840 quoted above.

ing. The petitioners admit that they mortgaged the WANDERER without the written consent of the Respondent insurance company. Both the Lower Courts ruled that this breach of warranty defeated Petitioner's right to recover for the total loss of the WANDERER, and that Article 4890 of the TEXAS STATUTES was inapplicable because it is nullified by general admiralty law. (R. 282).

While the policy was in effect Petitioners incorporated their partnership and transferred the WANDERER from their partnership to their corporation. The question of whether this transfer of the vessel constitutes a breach of warranty is not presented to this Court because it involves points of law not ruled on by the Lower Courts.

Respondent also declared the insurance coverage on the WANDERER was forfeited on the grounds that according to the terms of the policy the WANDERER could only be used for private purposes,[10] and that at some remote time prior to the destruction of the WANDERER, the Petitioners chartered their motorboat without first obtaining permission from Respondent. Petitioners admit that they had chartered the WANDERER but deny that the policy in question was forfeited because under the insurance laws of Texas a breach of a warranty relating to the use of personal property will not void the policy or constitute a defense to a suit on an insurance policy, unless such breach or violation contributed to bring about the destruction of the property.[11]

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[10] The warranty of use clause is worded as follows (R. 236):

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by endorsement."

[11] **Vernon's Revised Texas Statute 1925**, Article 4930, quoted above.

It is conceded that chartering of the WANDERER prior to its destruction had nothing to do with the loss in question. The WANDERER had been at a shipyard for quite some time prior to the loss and when it burned the vessel was moored to a buoy, a safe distance from shore and was not in use.

Again the lower Courts disregarded the Texas Insurance statute regulating the insurance business conducted within its boundaries and also disregarded The McCarran Act because the Courts believed that the Texas insurance statutes "involve a characteristic feature of substantive admiralty law" (R. 285), and therefore neither the Federal Statute or State insurance statutes could apply to a marine insurance policy. The precise characteristic feature of admiralty substantive law involved in this case is not pointed out by either lower Court. To support its legal conclusion the Trial Court applied the locality test (R. 32-34), used only in maritime tort cases, to a maritime contract case, contrary to the fundamental principles of maritime law.[12] The Circuit Court on the other hand appears to be impressed by the "uniformity doctrine" of the KNICKERBOCHER ICE COMPANY v. STEWART, 253 U.S. 149, and extended this doctrine, which has been restricted by this Court to cases involving tort claims under Workman Compensation cases,[13] to a cause of action based on a marine insurance policy.

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[12] **New England Marine Insurance Co. v. Dunham**, 78 U.S. 1 (1870), 20 L. Ed. 90.

[13] **Standard Dredging Company v. Murphy**, 319 U.S. 306, 309, 1943.

Reasons For Granting The Writ

I.

a Judicial Function to Regulate the Marine Insurance usiness.

lever before has an attempt been made to extend the e of general admiralty law to include the regulation of marine insurance business and thereby exclude State ılatory insurance statutes. It is a characteristic feature ıdmiralty law that the regulation of the marine insur- business be left to legislative bodies and not to the cial branch of the government. The English "MARINE URANCE ACT OF 1906" is a classical example.[1] Under e regulation the marine insurance business grew to such extent that the combined surplus of the marine insur- companies now exceeds one billion dollars. One of the ons urged for the granting of this writ is that under ting statutes and decisions the State insurance acts regu- ıg the marine insurance business have never been and ce should not be nullified by general admiralty law. McCarran Act of 1945 (15 U.S.C. 1011); HOOPER CALIFORNIA, 155 U.S. 648.

II.

ıgress Has Acted.

Congress by the enactment of the *McCarran Act* (15 .C. 1011) gave to the several States the power to pass ılatory statutes governing the insurance business, in- ding the marine insurance business. The lower Court in

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[1] See **Arnould on Marine Insurance**, 13th Ed., Vol. 2, pages -1226 for a copy of the Act and, **Winters on Marine Insurance**, Ed., pages 1 to 31 for a history of the development of marine rance regulations in Europe and United States.

construing this Act limited its application to insurance cases involving the commerce clause of the Constitution and ruled that the *McCarran Act* is inapplicable to a marine insurance business (R. 286). There is nothing in the wording of the *Act* itself or in its background which will support the lower Court's decision that the marine insurance business must be excluded from the *McCarran Act*.

If the lower Court's decision is correct then the *McCarran Act* must be declared unconstitutional because it is the purpose of the *Act* to include all insurance business. If the marine insurance business is excluded from the *McCarran Act* then the *Act* is unconstitutional because such a ruling would make the *McCarran Act* discriminatory. HOOPER V. CALIFORNIA, 155 U.S. 648. In order to clarify the scope and status of the *McCarran Act* this petition should be granted.

III.

Power of State to Regulate Insurance Business.

The power of a State to regulate marine insurance business conducted within its boundaries cannot be impaired by general admiralty law even though a marine insurance policy has been declared a maritime contract for jurisdictional purposes. INSURANCE CO. V. DUNHAM, 78 U.S. 1 (1870). This Court in HOME INSURANCE CO. V. DICK, 281 U.S. 397, 410 (1930); NUTTING V. MASSACHUSETTS, 183 U.S. 553; NEW YORK INSURANCE CO. V. CRAVEN, 178 U.S. 389, and HOOPER V. CALIFORNIA, 155 U.S. 648, held that a State can regulate the marine insurance business. In the NUTTING case this court stated:

> "A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such

> conditions as the State may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but is a mere incident of commercial intercourse."

In HOOPER v. CALIFORNIA, 155 U.S. 648, 655, 656, this Court held:

> "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they are formed for the purpose of doing fire or a marine insurance business, * * * . And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation * * *. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course to the paramount authority of the Constitution of the United States."

The Respondent has not shown that the authority of the Constitution of the United States has been impaired by the insurance statutes of the State of Texas mentioned in this petition and in view of the previous decisions of this Court it is clear that the Texas insurance statutes do not conflict with the United States Constitution. Neither is there anything, relating to the Texas insurance statutes, hostile to the characteristic features of maritime law albeit the Fifth Circuit Court of Appeals decision seems to indicate that a characteristic feature of substantive admiralty law is involved.

In CUSHING v. MARYLAND CASUALTY CO. (5 Cir.), 198

F. 2d 536, pending in this Court No. 498, State law was allowed to govern in a case involving a marine insurance policy even though substantive admiralty law was involved, to-wit: The Limitation of Liability Statute (46 U.S.C. 186). No substantive admiralty law is involved in the instant case but nevertheless the State insurance statutes were held to be inapplicable. In a previous decision by the Fifth Circuit Court in AETNA INS. CO. v. HOUSTON OIL & TRANSPORT Co., 49 F. 2d 121, 1931 A.M.C. 995, that Court held that Texas laws were inapplicable in a case where a watchman's clause in a marine insurance policy was construed.

The Court used the following language:

> "The policy covered the vessel in navigable waters of the United States without as well as within the State of Texas. It was a maritime contract and therefore governed by the general admiralty law and not the law of the State of Texas," citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Peters v. Veasey*, 251 U.S. 121; *Union Fish Co. v. Erickson*, 248 U.S. 308.[15] The laws of Texas have no application to the case."

HOME INS. CO. v. CICONNETT (6 Cir.), 179 F. 2d 892; SHAMROCK TOWING CO. v. AMERICAN INSURANCE CO. (2 Cir.), 9 F. 2d 57; WHEALTON PACKING CO. v. AETNA INSURANCE CO. (4 Cir.), 185 Fed. 108, cited in the lower Court's opinion in the instant case (R. 282) all relate to the construction of a watchman's clause in a marine insurance policy and do not discuss the validity of State insurance statutes and their application to a marine insurance policy. In reaching its decision the Lower Courts did not

[15] None of these cases relate to the marine insurance business and the right of a State to regulate marine insurance companies doing business within its boundaries nor do they indicate by what general admiralty law State insurance statutes are rendered inapplicable.

properly construe the McCarran Act but merely applied the above language of AETNA INS. CO. v. HOUSTON OIL & TRANSPORT CO., 1931 A.M.C. 995, 1000, to the case at bar in spite of the fact that this decision antedates the McCarran Act by fourteen years. The Petitioners challenge the rule of the AETNA case as well as the ruling in the case at bar to the effect that State insurance statutes relating to the provisions of a marine insurance policy are rendered null and void by general admiralty law.

IV.

Conclusion

Petitioners accordingly respectfully submit that a writ of certiorari should issue herein to the Court of Appeals for the Fifth Circuit.

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April, 1953